Ooi Thean Chuan v Banque Nationale de Paris

HIGH COURT (PENANG) — BANKRUPTCY NO 29-1213-89
EDGAR JOSEPH JR J
27 FEBRUARY 1992

Bankruptcy *— Petition — Validity of creditor's petition — Attestation of petition — Petition attested in foreign country by solicitor — Whether creditor's signature in petition properly verified — Bankruptcy Rules 1969 r 102*

Bankruptcy *— Petition — Validity of creditor's petition — Petition not annexed to verifying affidavit as exhibit — Effect thereof — Whether failure to annex petition to affidavit was mere irregularity or nullified proceedings — Bankruptcy Act 1967 ss 6(1) & 131 — Bankruptcy Rules 1969 r 106 & Form 11*

Bankruptcy *— Petition —Verification of contents by affidavit — Original petition to be annexed to affidavit — Bankruptcy Rules 1969 r 106 & Form 11*

Words and Phrases *— 'Annex' — Bankruptcy Rules 1969 Form 11*

The judgment creditor had presented a creditor's petition against the judgment debtor. The debtor had raised objections against the petition and had argued firstly that the petition was not properly attested as the attestation was done in Singapore by a solicitor who was not a qualified attesting witness under r 102 of the Bankruptcy Rules 1969 ('the 1969 Rules'). The debtor further contended that the petition had not been verified by affidavit as required by s 6(1) of the Bankruptcy Act 1967 ('the Act') and Form 11 prescribed by r 106 of the 1969 Rules in that although the verifying affidavit was filed together with the petition, the petition was not annexed to the affidavit.

Held, dismissing the creditor's petition:

(1) The attesting witness to the creditor's petition was not a qualified person within the meaning of r 102 of the 1969 Rules. The creditor's failure to comply with the requirement of verification of the creditor's signature to the petition would result in the basis of the court's jurisdiction being swept away. On this ground alone, the debtor was entitled to succeed.

(2) The verifying affidavit prescribed by r 106 is Form 11 which requires the petition to be annexed to it; the petition must be tied to or bound to or attached to or joined to or affixed to or stapled to the verifying affidavit, so as to avoid any dispute as to what exactly is being verified.

(3) In the absence of any statutory provision to the contrary, the correct and the only satisfactory way to verify the contents of any document is to annex a copy of it to the verifying affidavit. Accordingly, in the present case the creditor's petition had not been verified by affidavit with sufficient particularity to satisfy

A the requirements of s 6(1) of the Act and Form 11 prescribed by r 106.

(4) The creditor's failure to annex the petition to the verifying affidavit went beyond a mere irregularity and rendered the proceedings a nullity thereby sweeping away the court's jurisdiction. Accordingly the fact that no substantial injustice or no prejudice had been suffered by the debtor was immaterial and s 131 of the Bankruptcy Act 1967 did not apply. The creditor's non-compliance could not be cured by the subsequent reswearing and filing of the affidavit as the due verification of the creditor's petition in the manner described is a condition precedent to the issue of the petition by the registrar.

(5) Since Form 11 uses the words 'the petition hereunto annexed' and not 'a copy of the petition hereunto annexed', the petition to be annexed to the verifying affidavit would be an original and would therefore rank as an exhibit.

[Bahasa Malaysia summary

Pemiutang penghakiman telah mengemukakan suatu petisyen pemiutang terhadap penghutang penghakiman. Penghutang telah menimbulkan beberapa bantahan terhadap petisyen itu dan telah berhujah pada pertamanya bahawa petisyen itu tidak diaku saksi dengan betul kerana pengakusaksian itu telah dilakukan di Singapura oleh seorang peguamcara yang tidak layak menjadi saksi pengakuan di bawah k 102 Kaedah-Kaedah Kebankrapan 1969 ('Kaedah 1969 itu'). Penghutang selanjutnya berhujah bahawa petisyen itu tidak ditentusahkan oleh afidavit seperti yang dikehendaki oleh s 6(1) Akta Kebankrapan 1967 ('Akta itu') dan Borang 11 yang ditetapkan oleh k 106 Kaedah 1969 itu kerana walaupun afidavit yang menentusahkan petisyen itu telah difailkan bersama dengan petisyen itu, petisyen itu tidak dilampirkan kepada afidavit itu.

Diputuskan, menolak petisyen pemiutang itu:

(1) Saksi pengakuan kepada petisyen pemiutang itu bukan seorang yang berkelayakan dalam maksud k 102 Kaedah 1969 itu. Kegagalan pemiutang untuk mematuhi keperluan menentusahkan tandatangan pemiutang pada petisyen itu akan menyebabkan penghapusan asas bidang kuasa mahkamah. Atas alasan ini sendiri penghutang berhak untuk berjaya.

(2) Afidavit yang menentusahkan petisyen yang ditetapkan oleh k 106 adalah Borang 11 yang mengkehendaki petisyen itu dilampirkan kepadanya; petisyen itu mesti diikatkan pada atau dicantumkan pada atau disambungkan pada atau dilekatkan pada atau dikokotkan pada afidavit yang menentusahkan petisyen itu, supaya dapat mengelak sebarang pertikaian akan apa sebenarnya yang sedang ditentusahkan.

(3) Tanpa sebarang peruntukan statutori sebaliknya, cara tunggal yang betul dan yang memuaskan untuk menentusahkan kandungan

sebarang dokumen adalah untuk melampirkan satu salinannya kepada afidavit yang menentusahkannya itu. Oleh itu, dalam kes ini petisyen pemiutang itu tidak ditentusahkan oleh afidavit dengan ketelitian yang secukupnya untuk memuaskan keperluan s 6(1) Akta itu dan Borang 11 yang ditetapkan oleh k 106.

(4) Kegagalan pemiutang untuk melampirkan petisyen pada afidavit yang menentusahkannya itu melebihi luar aturan dengan semata-matanya dan menyebabkan pembatalan prosiding itu dan dengan itu menghapuskan bidang kuasa mahkamah. Oleh kerana itu fakta yang tiada ketidakadilan substantial atau tiada kemudaratan yang telah dialami oleh penghutang itu adalah tidak penting dan s 131 Akta itu tidak terpakai. Ketidakpatuhan pemiutang itu tidak boleh diperbaiki dengan kemudiannya menyumpah semula and memfailkan afidavit itu kerana penentusahan yang sepatutnya petisyen pemiutang itu dengan cara yang diterangkan adalah suatu syarat terdahulu kepada pengeluaran petisyen itu oleh pendaftar.

(5) Kerana Borang 11 menggunakan perkataan 'the petition hereunto annexed' dan bukan 'a copy of the petition hereunto annexed', petisyen yang harus dilampirkan pada afidavit yang menentusahkannya itu adalah suatu yang asal dan oleh itu akan dianggap sebagai suatu ekshibit.]

Cases referred to

1 *Re A Debtor* 86 LT 688 (distd)
2 *Re Harrison* (1904) 22 NZLR 864 (distd)
3 *Re Nicol* (1902) 22 NZLR 129 (folld)
4 *Seiffeddine v Governor & Company Adventures of England Trading into Hudsons Bay* (1978) 8 Alta LR (2d) 253 (refd)
5 *Panna v Mukhtiar Singh* AIR 1972 Punj 451 (refd)
6 *Re Coras, ex p The Deputy Commissioner of Taxation* (1943) 13 ABC 136 (distd)
7 *Oliver v Ashman* [1961] 3 WLR 669; [1961] 3 All ER 323; [1962] 2 QB 210 (folld)
8 *Re Daunt* (1905) 5 SR (NSW) 533 (refd)
9 *Re Abrahamson* 22 ALR 749 (folld)
10 *Au-Yong v Dicum & Anor* [1963] MLJ 349 (refd)
11 *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32 (refd)
12 *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd* [1992] 2 MLJ 102 (not folld)
13 *Western Benefit Building Society* 55 ER 409 (refd)
14 *Gotlieb v Danvers* (1796) 170 ER 418 (folld)
15 *Durston v Mercuri* [1969] VR 507 (folld)

Legislation referred to

Bankruptcy Act 1967 ss 5(1)(c), 6(1), 131
Evidence Act 1950 s 62 Explanation 2

Oaths and Affirmations Act 1949 s 7
Bankruptcy Rules 1969 rr 95, 102, 106, 131, 274, Forms 7, 11
Companies (Winding-Up) Rules 1972 r 26
Bankruptcy Act 1898 (NSW) [Aust] ss 6, 8
Bankruptcy Act 1892 [NZ] ss 38, 39, 166
Bankruptcy Rules 1886 [UK] rr 146, 350
Statutory Rules 1934 No 77 [Aust] Form 10

Karin Lim Ai Ching (*Presgrave & Matthews*) for the judgment creditor.
HK Chong (*Lim Cheng Poh Lim & Rahim*) for the judgment debtor.

Edgar Joseph Jr J: In these proceedings in bankruptcy, two objections were raised by counsel for the debtor. In the first place, it was contended that the creditor's petition, although attested in Singapore by a solicitor of the Republic of Singapore, had not been attested by a judge or magistrate or a consul or vice-consul or a notary public as required under r 102 of the Bankruptcy Rules 1969, which provides as follows:

> Every bankruptcy petition shall be attested. If it be attested in the Federation the witness must be a Solicitor or Magistrate or Official Assignee or Registrar. If it be attested out of the Federation the witness must be a Judge or Magistrate or a Consul or Vice-Consul or a Notary Public.

There is authority for saying that a defect of attestation in the creditor's petition should, if possible, be amended at the hearing. (See *Re A Debtor*[1] and *Re Harrison.*[2]) In the first of these cases, the petition had been presented jointly by two creditors but the signature of only one creditor was attested by a solicitor. Rule 146 (equivalent to our r 102) provided that every bankruptcy petition shall be attested. If it is attested in England the witness must be a solicitor or justice of the peace or an official receiver or registrar of the court. If it be attested out of England, the witness must be a judge or magistrate or a British consul or a notary public. Rule 350 (equivalent to our r 274) provided as follows:

> Non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceeding void, unless the court shall so direct, but such proceeding may be set aside, either wholly or in part, as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court may think fit.

In a very short judgment, Wright J speaking for the divisional court, said this:

> I do not think there is any difficulty in this case, for in my view this petition was wrongly dismissed by the registrar. [His Lordship read rr 146 and 350.] This was not like the case where a new petitioning creditor is added, but here there has been merely an omission to follow the rule. I think the attestation by a solicitor ought to have been allowed at the hearing.

These are two observations I should like to make regarding this case. First, the judgment of Wright J which, be it noted, was not the judgment of the

Court of Appeal, was unfortunately very meagre indeed, neither the facts nor the reasons for decision being set out. As to the facts, it is not at all clear whether both the creditors had or had not signed before the same solicitor.

Secondly, if both creditors had in fact signed before the same solicitor (who was undoubtedly a qualified attesting witness) but the latter attested the signature of only one of them, which on the facts seems perfectly possible, then that case can be readily distinguished from the present case where the attesting witness was not a qualified attesting witness. That case is therefore of no assistance to me.

In the second case — *Re Harrison*[2] — the omission was to have the petition attested by a solicitor who was in fact present at the signing and was treated by Williams J as an immaterial irregularity which did not prevent the court from causing the omission to be rectified under s 166 of the Bankruptcy Act 1892 (equivalent to our s 131). His Lordship said, inter alia, this at p 865:

> No doubt s 31 says that the petition shall be attested by a solicitor, but the mere use of the word 'shall' cannot prevent the court causing the omission to be rectified under s 166 if it is an immaterial irregularity only, and the mere use of that word does not make the irregularity material. Section 31 shows that the object of the prescribed attestation is to make it of itself, without further evidence, proof of the identity of the person signing with the petitioning creditor. The effect of the section is to dispense with evidence of identity if the terms of the section are complied with. It does not say that if they are not complied with the court may not receive other evidence of identity. The case of *Re a Debtor* 86 LT 688, decided on the English rules, does not appear to have been cited before the registrar. In that case the petition was not attested by a solicitor as required by the rules, and the registrar dismissed the petition. The court held that the registrar was wrong, and that the attestation by a solicitor ought to have been allowed at the hearing. The omission was therefore treated as a formal defect only. I think the petition should be reinstated for hearing, and that Mr Brown-Durie, in whose presence it was signed, should be allowed to attest it.

In my view, *Re Harrison,*[2] too, is of no assistance to me because there the creditor did in fact sign the petition before the solicitor who was a properly qualified attesting witness; *whereas* in the present case the creditor had signed before an attesting witness who was not qualified under the relevant rule. Indeed, *Re Harrison*[2] would appear to hinder rather than assist the case of the creditor for in that case it was pointed out that the object of the prescribed attestation is to make it of itself, without further evidence, proof of the identity of the person signing with the petitioning creditor or in other words, to dispense with evidence of identity of the attesting witness if the prescribed attestation is complied with. It was further pointed out that non-compliance with the prescribed attestation did not mean that the court may not receive other evidence of identity of the attesting witness.

In the present case, it was common ground that the attesting witness was not a qualified person within the meaning of the relevant rule. So, the question of receiving other evidence of identity does not arise as it did in *Re Harrison.*[2]

In *Re Nicol*,[3] the petition was verified by the petitioner by affidavit purporting to be made under s 38 of the Bankruptcy Act 1892, sworn before a justice of the peace (*not* a qualified attesting witness), annexed to and filed with the petition on 4 September 1902. On filing the petition a summons to the debtor was issued under s 39 of the Act. On 16 September 1902, the petitioner filed in the court and served on the debtor an affidavit sworn before a solicitor (a qualified attesting witness) verifying the petition, with a copy of the petition annexed thereto.

At the hearing on 17 September 1902, a preliminary objection was raised by counsel for Nicol that the verifying affidavit filed with the petition was not sworn as required by law. Counsel for the petitioner then made an application to the court to amend the proceedings by admitting the affidavit of the petitioner filed on 16 September 1902, or in other words 12 days *after* the filing of the petition, as sufficient verification of the petition; but the judge refused to allow the amendment, and dismissed the petition.

Williams J considered that the due verification of the petition was a condition precedent to the issue of a summons out of the court. He held that there was no jurisdiction to issue a summons to the debtor under s 39 of the Bankruptcy Act 1892, as the petition having been verified by affidavit sworn before a justice of the peace was not verified as required by s 38 (equivalent to our s 6(1)), so that the resulting defect could not be amended or rectified under s 166 (equivalent to our s 131) and was a nullity.

He further held that due verification of the petition was a condition precedent to the issue of the summons out of the court and that the effect of non-compliance with the same was to take away the jurisdiction of the registrar of the court to issue the summons.

Accordingly he declined to treat the defect as a formal one which could be remedied under s 166 but regarded it as one of substance. Explaining the legal position, he said this at p 131:

> It seems to me that *where the jurisdiction of the court to bring the alleged bankrupt before the court by summons depends, by the terms of the statute, on certain things being previously done, and those things are not done, the basis of the jurisdiction is swept away.* I think that the observations of Chief Justice Bacon in the case of *Ex p Coates, In re Skelton* 31 LT 415, apply to cases of this kind. He says, 'It is the very gist and essence of the Bankruptcy Act that creditors who claim the benefit of these severe and almost criminal provisions of the law cannot have that benefit unless they strictly comply with the terms of the Act.' Those are observations that, it seems to me, apply in the present case. If a creditor does not do what the Act requires him to do, he cannot ask the court to allow him the benefit of the Act. The appeal will be dismissed; costs, 6 pounds 6 shillings. (Emphasis supplied.)

Although *Re Nicol*[3] was a case of verification of a petition by affidavit *whereas* the present case is one of verification of the creditor's signature to the petition, I fail to see any distinction in principle between the two situations because failure to comply with either of the requirements for verification will result in the basis of jurisdiction being swept away. In my

opinion the rule in *Re Nicol*[3] applies to the present case and on this ground alone, the debtor is entitled to succeed.

In the second place, it was contended that even if the creditor's petition dated 11 July 1990 was properly attested, it had not been verified by affidavit as required by s 6(1) of the Bankruptcy Act 1967 and Form 11 prescribed by r 106.

The facts, so far as material to this objection, were these: The affidavit purporting to verify the petition was affirmed on 11 July 1990 and was as follows:

> In the High Court of Malaya at Penang
> Bankruptcy No 29–1213–89 (Court 1)
>
> Per Ooi Thean Chuan ... Judgment Debtor
>
> Ex parte Banque Nationale de Paris ... Judgment Creditor
>
> Affidavit as to the truth of statement in petition
>
> I, Colin William Meyer (KP 0003776–A) of Banque Nationale de Paris at No 20 Collyer Quay #10–01, Tung Centre, Singapore solemnly and truly declare and say as follows:
>
> 1 That I am the credit controller of the JC of No 20, Collyer Quay #10–01, Tung Centre, Singapore and am authorized under the company seal to submit/tender the aforesaid petition and to make this affidavit.
> 2 That each and every statement in the aforesaid petition is true according to my personal knowledge.
>
> Sworn in on 11 July 1990
> in Singapore.
>
> Before me,
> sgd Kandiah Visvalingam
> Advocate & Solicitor,
> Notary Public,
> Maxwell House
> Singapore 0106.
> Tel: 2213603, 2208438

Although the affidavit was filed together with the petition on 13 September 1990, the petition was not attached to or tied to or bound to the affidavit. The question arises whether this was essential.

To put matters in proper perspective it is necessary to reproduce s 6(1), r 106 and Form 11. Section 6(1) reads as follows:

> A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.

Rule 106 reads as follows:

> (1) A creditor's petition shall be verified by affidavit.
> (2) A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them.

A Form 11 reads as follows:

No 11
(Rule 106)
(Title)

B Affidavit of Truth of Statements in Petition

I, the petitioner named in the petition hereunto annexed affirm (if the petitioner declare or affirm, alter the form accordingly) and say:

1 That the several statements in the said petition are within my own knowledge true.

C Affirmed at, etc ...

Note — If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge, he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the D remaining statements.

It is obvious that the verifying affidavit prescribed by r 106 is Form 11 which requires the petition to be annexed to it. The bracketed words in Form 11 which read 'if the petitioner declare or affirm, alter the form accordingly' do not, in my view, offer the alternative of dispensing with the E requirement of having to annex the petition to the affidavit. I would, however, observe that the bracketed words are perplexing since the first ten words of the prescribed affidavit are as follows: 'I, the petitioner named in the petition hereunto annexed, *affirm*' (emphasis supplied).

Where, therefore, the deponent affirms as opposed to taking an oath, F which is the invariable practice in our courts (indeed, s 7 of the Oaths and Affirmations Act 1949 (Rev 1977) provides that where any person is required to take an oath the requirement shall be deemed to be complied with if an affirmation is made), then the bracketed words which say 'if the petitioner declare or affirm, alter the form accordingly' would appear to be redundant. The bracketed words would only be relevant if the G form had read, as does Form 10 prescribed by the Statutory Rules 1934 No 77 made under the Bankruptcy Act 1924–1933 (Com) of Australia: 'I ... the petitioner named in the petition hereto annexed, *make oath* (if the petitioner declare or affirm, alter the form accordingly) and say' (emphasis supplied).

H I note in passing, that para 1 of Form 7 which is the affidavit prescribed by r 95 in applications to set aside a bankruptcy notice reads: 'That I ... was, on the ... day of ..., served with the notice hereunto annexed (*or describe the notice*)' (emphasis supplied). Unlike Form 11, Form 7 clearly offers the alternative of not annexing the notice provided it is described.

The next question is what is the meaning to be assigned to the expression I 'hereunto annexed'. As for the word 'annexed', *Black's Law Dictionary* (4th Ed) at p 115 defines 'annex' as: 'Derived from the Latin annectere, meaning to tie or bind to, to attach, and often, specifically, to subjoin ... to add

to; to unite. The word expresses the idea of joining a smaller or subordinate thing with another, larger, or of higher importance ... to make an integral part of something larger'. *Webster's Dictionary* includes in the definition of 'annex' the phrases, 'to add or affix, especially a smaller thing to a larger ... that which is added ... addition' (applied by Hope J in *Seiffeddine v Governor & Company of Adventures of England Trading into Hudsons Bay*[4] at p 257). 'Annexure' is something which is added, joined or attached, affixed, or appended (see *Panna v Mukhtiar Singh*[5] at p 454).

I would respectfully pray in aid the definition of the verb 'annex' given in *Black's Dictionary* in construing the word 'annexed' appearing in Form 11 prescribed by r 106. The word 'hereunto' is merely complementary to the word 'annexed' for without it the sentence would be incomplete, and serves, if anything, to emphasize that the petition must be tied to or bound to or attached to or joined to or affixed to or stapled to the verifying affidavit, so as to avoid any dispute as to what exactly is being verified.

The further question which arises is what is the effect of failure to annex the petition to the verifying affidavit?

I note that in the Queensland case of *Re Coras, ex p The Deputy Commissioner of Taxation,*[6] on a creditor's petition grounded on an unsatisfied execution, the evidence of the act of bankruptcy was the sheriff's affidavit, which annexed a copy of the writ of execution and a copy of his return, but not a copy of the warrant. It was held that the affidavit of the sheriff was a sufficient compliance with r 161 which reads:

> Where the ground of the petition is an unsatisfied execution under para (e) of s 52 of the Act, the warrant of execution endorsed by the Sheriff or the affidavit of the Sheriff with a copy of warrant shall be annexed to the petition.

The judgment of Douglas J runs into just four lines and is a simple ipse dixit. It reads:

> I am satisfied that the act of bankruptcy alleged in the petition is established and that the provisions of r 161 have been complied with. I make a sequestration order against the debtor, Leo Coras, and appoint Mr JE Tregenza, official receiver.

I do not consider the simple ipse dixit of the judge sufficient to constitute proper grounds of judgment. It is not enough to use the words of Shelley, 'I cannot argue, I can only feel,' as the foundation of a judgment (per Holroyd Pearce LJ in *Oliver v Ashman*[7] at p 682).

To comment further on the case of *Re Coras,*[6] I note that at the hearing, at which the judgment debtor does not appear to have been represented, counsel for the petitioning creditor had argued that the term 'warrant', as used in r 161, includes 'writ' in the case of an execution issued out of the Supreme Court of Queensland. Upon the facts, such a writ was in fact annexed to the affidavit. Counsel further argued that such a writ directed to the sheriff could be executed by the sheriff personally, in which case no warrant would be necessary or be in existence to annex to the affidavit of the sheriff.

A In any event, I would regard the case of *Coras*[6] as readily distinguishable, having regard to the cogent arguments of counsel for the petitioning creditor, which I suppose must have influenced Douglas J in arriving at his conclusion. I do not therefore consider the case of *Re Coras*[6] to be of any assistance.

B In the Australian case of *Re Daunt,*[8] Walker J held that a petition was presented when it was filed and was not validly presented unless and until it has been filed together with a verifying affidavit. In so holding, the learned judge referred to ss 6 and 8 of the Bankruptcy Act 1898, then in force. Section 6 (equivalent to our s 5(1)(c)) provided that a creditor shall not be entitled to present a bankruptcy petition unless the act of bankruptcy C on which the petition is grounded has occurred within six months before the presentation of the petition. Section 8 (equivalent to our s 6(1)) declared (1) that a creditor's petition shall be verified by affidavit of the creditor or some person on his behalf having knowledge of the facts and served in the prescribed manner; (2) that at the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the D petition, and of the act of bankruptcy. His Lordship concluded, at p 538 para 2, that 'the joint effect of them [ss 6 and 8] is that a creditor's petition *must* be verified on presentation' (emphasis provided).

A far better case is the Tasmanian case of *Re Abrahamson.*[9] In that case, Neasey J when considering an objection that the creditor's petition had not E been verified by affidavit as required by s 47 of the Bankruptcy Act (equivalent to our s 6(1)) had held that the correct and the *only* satisfactory way to verify the contents of any document is to annex a copy of it to the affidavit. This case is precisely in point and I think that the following passages in his Lordship's judgment at pp 751 and 752, with which I entirely agree, deserve reproduction:

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> The third objection is that the creditor's petition has not been verified by affidavit, as required by s 47 of the Bankruptcy Act. The body of the affidavit, which is the crucial part, does not annex a copy of the creditor's petition which it purports to verify, but merely refers by inference to a petition mentioned in the title. That is to say, the affidavit verifying the creditor's petition is intituled in the G ordinary way as follows:
>
> 'In the Supreme Court of Tasmania
> Exercising Federal jurisdiction in Bankruptcy
> District of the State of Tasmania
> No P142 of 1978
> re: Klaus Herman Abrahamson
>
> H
>
> Ex p Crisp and Gunn Ltd
> In the matter of a petition dated 2 October 1978.'
>
> The deponent then proceeds to depose that he is the credit manager of the petitioning creditor, and is 'authorized to make this affidavit on the petitioning creditor's behalf'. He states that he is the person in charge of and responsible for I 'the records of the petitioner relating to the account of Klaus Herman Abrahamson', and then deposes 'that the several statements contained in paragraphs one, two and three of the said petition are of my own knowledge true'. In

my opinion this does not verify the contents of any particular petition with sufficient particularity to satisfy the requirements of s 47(1)(b). The verifying clause merely refers to 'the said petition' and there is no specific petition referred to in the body of the affidavit. Verification of the creditor's petition is not an inconsequential matter. For example, s 52(1)(a) provides that at the hearing of a creditor's petition the court shall require proof of the matters stated in the petition, but for that purpose may accept the affidavit verifying the petition as sufficient — and see *McDonald, Henry & Meek's Australian Bankruptcy Law & Practice* (5th Ed) notes to para 2021. The correct and, in my view, the only satisfactory way to verify the contents of any document is to annex a copy of it to the affidavit, as is commonly done with affidavits of service and the like, and as the recommended form B4 on p 682 of *McDonald, Henry & Meek* sets out. The relevant affidavit in this case does not fulfil the statutory requirement of s 47(1)(b), and the failure to do so is not a mere formal defect or irregularity.

I would accordingly hold that in the present case the creditor's petition had not been verified by affidavit with sufficient particularity to satisfy the requirements of s 6(1) and Form 11 prescribed by r 106 and that in the absence of any statutory provision to the contrary, the correct and the *only* satisfactory way to verify the contents of any document is to annex a copy of it to the verifying affidavit. Accordingly, the failure to do so goes beyond being a mere irregularity and amounts to something that renders the proceedings a nullity thereby sweeping away the jurisdiction of the court. That being the case, the fact that no substantial injustice or no prejudice had been suffered by the debtor is beside the point and s 131 of the Bankruptcy Act 1967 is without application.

I would, in this context, refer to the following passage in the judgment of Thomson CJ in *Au-Yong v Dicum & Anor*[10] at p 351 col 2F:

In relation to the application of s 131 of the Bankruptcy Ordinance there are two questions to be considered.

The first is whether what is complained of is an irregularity. If any non-compliance with the requirements of the law goes beyond being a mere irregularity and amounts to something that renders the proceedings a nullity that is, of course, the end of the matter and the section has no application. If there is only an irregularity the second question is whether the court is of opinion that in consequence 'substantial injustice has been caused'.

I must next mention my decision in *Sobri bin Arshad v Associated Tractors Sdn Bhd*,[11] where I had held that a creditor's petition was not valid because the affidavit verifying its contents had been affirmed before it was presented. In arriving at that conclusion, however, I did not treat the issues which arose for consideration with the same degree of elaboration as in the present case, a course which I have found necessary in view of a recent decision of VC George J in the case of *Re Mohd Sharif bin Sapie, ex p Malayan Banking Bhd*[12] wherein his Lordship embraced the opportunity of saying that he did not share my view in *Sobri*'s case.[11] In the circumstances, I must at this point, proceed to analyse the judgment of his Lordship.

The very first point I should like to make is that it is obvious from the short concluding paragraph of his judgment (which runs into just over ten

pages of typescript) that the creditor's affidavit of truth verifying the bankruptcy petition as it stood had duly met the requirements of the Bankruptcy Act and the Rules as to verification of the petition so that there was no need for any reswearing. If that is so, then the rest of his judgment is purely obiter. Be that as it may, as the dicta consist of considered opinions, they call for careful consideration.

In my view, the learned judge ought to have considered the following questions of critical substance: (1) whether s 6(1) of the Bankruptcy Act 1967, read with Form 11 prescribed by r 106(1), requires the petition not only *to accompany* the verifying affidavit but also *to be annexed* to it upon presentation; (2) if so, whether due verification of the creditor's petition is a condition precedent to the issue of the creditor's petition having regard to the penal consequences of adjudication; and (3) if so, whether non-compliance with such condition precedent sweeps away the jurisdiction of the court to bring the alleged bankrupt before the court and so cannot be condoned.

I note that the learned judge has concentrated on the question whether *affirming* the affidavit *before* the creditor's petition is *filed* would affect the validity of the petition.

Doubtless, as the learned judge puts it, 'out of pragmatic necessity' the dating, signing, witnessing and attesting of a petition would have to take place before the petition is filed. Once these steps have been complied with the petition comes into being even though not yet filed. The contents of the petition would then have to be verified by affidavit in accordance with Form 11 prescribed by *r 106*. The correct and only satisfactory way to verify the petition is to annex it to the affidavit (per Neasey J in the *Abrahamson* case[9]), this being in my view a mandatory requirement of s 6(1) of the Bankruptcy Act 1967. This requirement is in stark contrast to r 26 of the Companies (Winding-up) Rules 1972 ('r 26') which provides that the affidavit verifying the petition for the winding up of a company 'shall be sworn *after* and filed within *four days after* the petition is presented'.

The learned judge, whilst noting the provisions of r 26, has gone on to state that neither s 6(1) of the Bankruptcy Act 1967 nor r 106(1) nor any of the other provisions of the Bankruptcy Act 1967 or the rules say *when* the affidavit verifying the bankruptcy petition is to be sworn.

In my view, he ought to have held that upon a proper construction of s 6(1) and Form 11 prescribed by r 106, it is a condition precedent that a bankruptcy petition would not only have to be *accompanied* by a verifying affidavit but also be *annexed* to it. These provisions do indicate clearly the *latest* time by which the affidavit verifying the petition is to be affirmed.

In consequence of not so holding he appears to have placed undue stress on r 26 which has nothing to do with bankruptcy proceedings and, in consequence, appears to have relied on the dictum of Romily MR in *Western Benefit Building Society*[13] that whilst an affidavit sworn before the presentation of a petition in proceedings to wind up a company 'amounted

to nothing', the defect could be rectified by reswearing of the affidavit and the order dated subsequently.

It goes without saying that if, as I have held, that the due verification of the creditor's petition in the manner described (that is to say, it is annexed to and verified by affidavit at the time of filing) is a condition precedent to the issue of the bankruptcy petition by the registrar (per Williams J in *Re Nicol*[3] and per Neasey J in *Re Abrahamson*[9]), then non-compliance cannot be cured by the subsequent reswearing and filing of a verifying affidavit as the omission sweeps away the jurisdiction of the court.

In this context too, it is my view that the learned judge appears to have given insufficient weight to the fact that what a petitioning creditor seeks by his petition is, in the words of Fletcher-Moulton LJ in *Re A Debtor*:[1] 'in the highest degree penal in its consequences ... and amounts to loss of civil status carrying with it grave consequences'. These implications do not arise in proceedings to wind up a company.

In all the circumstances, this creditor's petition is dismissed with costs.

As soon as I had read my judgment in open court, counsel for the creditor had asked for guidance as to whether the creditor's petition to be annexed to the verifying affidavit should be an original or a copy. In answer, I said off-hand, that since Form 11 used the words 'the petition hereunto annexed' and not a 'copy of the petition hereunto annexed', presumably what was recommended was that the original petition be annexed.

Having reflected on the point raised I would add a few words. In practice, a number of petitions would be made by one uniform process by typewriter or word processor or computer, so that each would be primary evidence of the rest. (See Explanation 2 to s 62 of the Evidence Act 1950 (Rev 1971).)

It is often overlooked that there can be more than one original of a document. As far back as 1796, Eyre CJ held in *Gotlieb v Danvers*[14] that where two copies of the same document are made at the same time, both should be deemed originals. Signed carbon copies may also be deemed originals. In *Durston v Mercuri*,[15] Menhennitt Jr dealing with a carbon copy of a breath analysis certificate, commented:

> I am concerned with a document which is a carbon copy of the original and contains everything that was in the original including the signature. Thus it is in one sense an original. The same hand using the same pen produced at the same time the writing on both the original and the carbon copy. In the case of the original the writing was left by the ink from the pen; in the case of the carbon copy it was left by the carbon from the carbon paper. But the words written were both produced by the same writing. In these circumstances, I am disposed to think that a carbon copy of a document which is a complete copy in every respect including the signature is for all purposes equivalent to the original and admissible in evidence as prime evidence of the contents of the original.

I therefore see no practical difficulties arising from the implementation of the views I have expressed herein regarding the steps to be taken by a

creditor when filing his papers. The petition to be annexed to the verifying affidavit would be an original and would therefore rank as an exhibit for which the fee payable would be the usual $1.50 per exhibit. On the other hand, the other petition duly signed, dated and witnessed, would also be deemed an original, and would be separately filed (at the same time that the verifying affidavit is filed) and would attract a filing fee of $75.

Creditor's petition dismissed.

Reported by PS Ranjan